APPEAL NO. 010565

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on February 20, 2001. The hearing officer determined that: the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the 12th and 13th quarters; the claimant did not attempt in good faith to obtain employment commensurate with his ability to work; and the claimant was not unemployed or underemployed as a direct result of his impairment. In so holding, the hearing officer rejected the argument that the claimant's self-employment efforts demonstrated fulfillment of the good faith job search requirement.

The claimant has appealed on all the issues, raising both factual sufficiency and legal arguments. The respondent (carrier) responds, urging affirmance.

DECISION

Affirmed.

Sections 408.142 and 408.143 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102) set out the statutory and regulatory requirements for SIBs. At issue in this case are the good faith job search and direct result requirements.

The claimant is self-employed. He has a home-based business breeding and selling Great Pyrenees herd guarding dogs and miniature long-haired Tennessee wooden leg fainting goats. He also has a business selling immune stimulants and high tech breeding devices. The hearing officer has reviewed the facts in considerable detail, which will not be repeated here.

GOOD FAITH EFFORT TO OBTAIN EMPLOYMENT

To be eligible for SIBs, the claimant was required to meet the "good faith" job search requirement in accordance with Rule 130.102(d)(1)-(5). The record contains no evidence that the claimant made any job searches during the qualifying period for the 12th quarter. The claimant testified that he made seven job searches for the qualifying period for the 13th quarter between December 21, 2000, and January 4, 2001, but the hearing officer did not believe this was a good faith effort. It is clear the claimant expends a lot of time and energy on his self-employment ventures; however, he has made little to no profit. The hearing officer could evaluate whether the claimant demonstrated a return to work relatively equal to his ability to work (Rule 130.102(d)(1)) such that the search for employment requirement was met. *See* Texas Workers' Compensation Commission Appeal No. 001635, decided August 25, 2000, Texas Workers' Compensation Commission Appeal No. 002188, decided October 25, 2000, and Texas Workers' Compensation Commission Appeal No. 002964, decided February 6, 2001.

In Appeal No. 002964, the claimant in this case appealed the hearing officer's determination that his self-employment efforts did not demonstrate fulfillment of the good faith job requirement for the 11th quarter. The Appeals Panel affirmed the hearing officer's determination in Appeal No. 002964. In the present case, the claimant submitted an abundance of documentary evidence and testified as to his business practices, income, expenses, education, and day-to-day activities. It is for the hearing officer to evaluate and determine the weight to be given to the evidence presented. After evaluating the evidence and testimony, the hearing officer determined that the claimant's self-employment efforts did not rise to a good faith effort to obtain employment commensurate with his ability to work. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain , 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we decline to substitute our opinion of the credibility of the witness and weight of the evidence for that of the hearing officer. The hearing officer's decision is affirmed on this issue.

DIRECT RESULT

The hearing officer determined that the claimant was not unemployed or underemployed as a direct result of his impairment. In making this determination, the hearing officer stated, ". . . more recent information provided at this CCH provided better information regarding the relationship between the injury for which the claimant received an impairment rating [IR] and the claimant's current problems." The claimant contends that this determination was in error and the issue is *res judicata* for 12 months pursuant to Section 408.149, which provides in relevant part:

> (a) Not more than once in each period of 12 calendar months, an employee and an insurance carrier each may request the [Texas Workers' Compensation Commission (Commission)] to review the status of the employee and determine whether the employee's unemployment or underemployment is a direct result of impairment from the compensable injury.

The claimant argues that in his decision for the 11th quarter, the hearing officer determined that the claimant's underemployment was a direct result of the claimant's impairment and the carrier failed to appeal the issue.

Section 408.149 is a limitation on the parties. Section 408.086 provides:

> (a) During the period that impairment income benefits [IIBs] or [SIBs] are being paid to an employee, the commission shall determine at least annually whether any extended unemployment or underemployment is a direct result of the employee's impairment.

Additionally, Rule 130.102 provides for a two-prong test in determining eligibility for SIBs. Rule 130.102(b) states:

> (b) Eligibility Criteria. An injured employee who has an [IR] of 15% or greater, and who has not commuted any [IIBs], is eligible to receive [SIBs] if, during the qualifying period, the employee:
>
> (1) has earned less than 80% of the employee's average weekly wage as a direct result of the impairment from the compensable injury; and
>
> (2) has made a good faith effort to obtain employment commensurate with the employee's ability to work.

The issue at the CCH was entitlement to SIBs for the 12th and 13th quarters. Both parties submitted evidence on the issue, including medical evidence, and it was for the hearing officer to determine if Rule 130.102(b) was satisfied. Each compensable quarter stands alone and the determinations in one quarter are not necessarily binding on subsequent quarters. *See* Texas Workers' Compensation Appeal No. 000512, decided April 24, 2000. We note that Section 408.086(b) provides for a determination by the Commission on the direct result criterion "at least annually," which indicates that such a determination may be made more frequently if necessary. Each time the issue of entitlement to SIBs is raised at a CCH, the hearing officer is obligated to apply Rule 130.102(b), thereby making it necessary to determine if the direct result criterion has been met. It necessarily follows that such a determination by the hearing officer may well have to be made more than once every 12 months. We are unaware of any decision which holds that a hearing officer's finding on the direct result criterion in one quarter is binding on the hearing officer for 12 months thereafter. Accordingly, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Michael B. McShane
Appeals Judge